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Supreme Court of the United States

October Term, 1942

No. 948

ANTONIO STORNELLI

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Second Circuit, and Brief in Support of Petition.

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Dated, April 19, 1943.

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SUBJECT INDEX

	Page
Petition for writ of certiorari	
Summary and short statement of matter involved	1
Basis of jurisdiction	3
Questions presented	3
Statutes involved	2, 3
Reasons relied on for the allowance of the writ	4
Prayer for writ	5
Brief in support of petition for writ of certiorari	
Opinion of court below	865
Statement of case	8
Questions presented	7
Statutes involved	8
Argument	
Point I	12
Point II	16
Point III	22
Conclusion	24

TABLE OF DECISIONS AND CITATIONS

Title	Page
Amberg vs. Kinley, 214 N. Y. 531	20
Bellows vs. Merchants Despatch Transportation Co., 257 N. Y. App. Div. 15	20

Title	Page
Bertles vs. Nunan, 92 N. Y. 152	15
Burke vs. Witherbee, 98 N. Y. 562	17
Dittiger vs. Isal Realty Corp., 264 N. Y. App. Div. 279	19
Galeota vs. United States Gypsum Co., 123 Fed. 2d. 947, cert. den. 315 U. S. 813	24
Homin vs. Cleveland & Whitehill Co., 281 N. Y. 484	20
Kirby vs. Montgomery Brothers & Co., 197 N. Y. 27	17
Leppard vs. O'Brien, 225 N. Y. App. Div. 162, affd. 252 N. Y. 563	15
Martin vs. Herzog, 228 N. Y. 164	20
Mautsewich vs. United States Gypsum Co., 217 N. Y. 593	12, 18
Michalek vs. United States Gypsum Co., 76 Fed. 2d. 115, modified 298 U. S. 639	16, 18
Miller vs. Town of Irondequoit, 243 N. Y. App. Div. 240, affd. 268 N. Y. 578	15
Pieczonka vs. Pullman Co., 89 Fed. 2d. 353	15
Schmdit vs. Merchants Despatch Transportation Co., 270 N. Y. 287	16, 18
Shepard vs. Taylor Publishing Co., 234 N. Y. 465	21
Teller vs. Prospect Heights Hospital, 280 N. Y. 456	20
Transit Comm. vs. Long Island R. R. Co., 253 N. Y. 345	15
20 Amer. & Eng. Ency. of Law, 2d. Ed., 1902, Master & Servant, p. 58	21
39 Corpus Juris, Master & Servant, Sec. 488, p. 371	21

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STATUTES CITED

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Section 299 New York Labor Law 17

Section 200 New York Labor Law 19

Section 202 New York Labor Law 20

Section 48, Subdivision 2 New York Civil Practice Act 2, 8, 16

Section 49, Subdivision 6 New York Civil Practice Act 3, 16, 25

Section 4 New York Labor Law of 1890 (Chap. 394 L. 1890) 13

Section 122 New York Labor Law of 1897 (Chap. 415 L. 1897) 14

Section 122 New York Labor Law of 1907 (Chap. 399 L. 1907) 14

Section 122 New York Labor Law of 1909 (Chap. 36 L. 1909) 14

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ANTONIO STORNELLI
vs.
UNITED STATES GYPSUM COMPANY,
Petitioner.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Second Circuit.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of the United States Gypsum Company for a writ of certiorari to review the decision of the United States Circuit Court of Appeals, Second Circuit, rendered March 16, 1943, affirming a judgment in favor of the plaintiff-appellee, which judgment was entered in the United States District Court for the Western District of New York on September 10, 1942 for $5,154.52 damages and costs, respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff because of breach of statute of the defendant during the plaintiff's employment in the defendant's gypsum mine in Genesee County, New York. The plaintiff claims that a lung condition described as silicosis or "industrial fibrosis" was aggravated by his exposure to free silica dust during the last year of his employment which was from April 1929 to April 1930.

The cause of action is based solely upon alleged violations of Sec. 417 of the Labor Law of the State of New York which the plaintiff claims creates a "statutory" cause of action separate and distinct from a common law cause of action for negligence. No issues involving common law negligence were submitted to the jury.

The matters here involved are:

(1) Whether Sec. 417 of the New York Labor Law applies to this case, where the injury is wholly based upon an alleged inhalation of dust, since the statute refers only to the removal of "smoke and noxious gases" and does not refer in any way to the removal of dust.

(2) Whether the action was commenced within the time limited by the New York statute of limitations as "an action to recover upon a liability created by statute" (six years from the accrual of the cause of action) or whether it was barred by the New York statute of limitations as "an action to recover damages for a personal injury, resulting from negligence" (three years from the accrual of the cause of action).

The following statutes are involved:

Sec. 417 of the *New York Labor Law:*

> Ventilation. An air current sufficient to remove smoke and noxious gases and to insure the safety of every employee shall be conducted along every passageway and working place.

Sec. 48 of the *New York Civil Practice Act:*

> Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:
>
> * * * * * * *
>
> 2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

Sec. 49 of the *New York Civil Practice Act:*

> Actions to be commenced within three years. The following actions must be commenced within three years after the cause of action has accrued:
>
> * * * * * * *
>
> 6. An action to recover damages for * * * a personal injury, resulting from negligence.

(3) Whether the plaintiff was entitled to succeed without showing that he was actually exposed to free silica dust at the places he worked in the mine, the proof being limited to the statement that there was a small amount of free silica in the rock at some indefinite point in the mine, which was not connected up with any place the plaintiff worked.

BASIS OF JURISDICTION

This Court has jurisdiction of this petition by virtue of Sec. 240 of the Judicial Code as amended (28 U. S. C. A. Sec. 347), which provides as follows:

> Certiorari to circuit courts of appeals and United States Court of Appeals for District of Columbia; appeal to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal.

QUESTIONS PRESENTED

(1) Does Sec. 417 of the New York Labor Law apply to this case since it omits any reference to dust.

(2) Is the cause of action herein an action "to recover upon a liability created by statute" or is it a common law action to recover damages for "a personal injury, resulting from negligence."

(3) Was there substantial evidence that the plaintiff was exposed to free silica dust.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) The Court erred in holding that Sec. 417 applied to this case, since the statute makes no mention of dust and the Court was not justified in reading dust into it.

(2) The Court in determining that the action was not barred by the three year statute of limitations necessarily held that Sec. 417 of the New York Labor Law created a "statutory" cause of action which was separate and distinct from a common law action to recover damages for a personal injury resulting from negligence. Such a holding is in conflict with decisions of the New York courts in respect to quite similar provisions of the New York Labor Law.

(3) The Court erred in deciding that there was substantial proof that the plaintiff was exposed to free silica dust. Not only was there no testimony that there was free silica dust in the *air* at any point in the mine, but there was utterly no testimony that the plaintiff ever worked at any point in the mine where there was free silica dust in the surrounding *rock* which was being worked, nor that he worked at any point in the mine where the air current could carry such dust to him. This case may be followed by other courts in similar cases not only in New York State but in other States.

The decision of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial pro-

cedure, and has sanctioned such departure by the District Court, so as to require an exercise of this Court's power of supervision.

To accept the Circuit Court's position is to say that plaintiffs in this type of action—wholly involving dust—may base a cause of action upon a statute which makes no reference to dust; avoid the three year statute of limitations which has usually been accepted in personal injury actions, and hold an employer as an insurer *pro tanto* without any substantial proof that such plaintiffs were actually exposed to any harmful dust at any time in issue.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of this Honorable Court directed to the United States Circuit Court of Appeals, Second Circuit, commanding such Court to certify and send to the Supreme Court a transcript of the record of the proceedings in the United States Circuit Court of Appeals, Second Circuit in the above matter for its review and determination pursuant to the provisions of law applicable thereto, to the end that said decision of the Circuit Court of Appeals may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just.

Respectfully submitted,

T. CARL NIXON,
Attorney for Petitioner,
31 Exchange Street,
Rochester, New York.

Dated: April 19, 1943.

CASPER V. BALTENSPERGER, Rochester, N. Y.
WENDELL J. BROWN, Chicago, Ill.
Counsel.